thereon the sum of $1,300.00, leaving a balance due of $8,-500.00. Smith, without reason therefor, declined to make further payments, and the bank brought two suits contemporaneously for judgment and foreclosure, one in Creek County, Oklahoma, and the other in Chautauqua County, Kansas. Smith, by dilatory tactics, was enabled to delay the trial of the case in the county of his residence, Creek County, Oklahoma, much longer than he was able to delay the case in Chautauqua County, Kansas. Consequently, the case in Kansas was tried first. Smith interposed various and sundry dilatory tactics and untenable defenses. Judgment was entered against him in Chautauqua County, Kansas, for the balance due. In order to delay payment, Smith appealed to the Supreme Court of Kansas, where that case was affirmed. *The Fourth National Bank of Tulsa* v. *Smith*, 44 P. (2d) 242.

The property covered by the mortgage in Chautauqua County, Kansas, was sold and the proceeds applied toward the liquidation of the judgment, which left a balance of $7,827.85, with interest. The respondent, The Fourth National Bank of Tulsa, then filed an amended pleading in the District Court of Creek County, Oklahoma, and acknowledged credit on the indebtedness, which credit was derived from the sale of the property in Kansas and left a balance of $7,827.85 with interest. Smith, in pursuance of the dilatory tactics he has always employed, filed a motion to strike the amended petition, although it gave him a credit. This was sustained, and thereafter The Fourth National Bank of Tulsa filed its motion to vacate the order sustaining the motion to strike, which was accordingly done, and from that interlocutory order Smith appealed to the Supreme Court of the State of Oklahoma. That court, after much delay, held that the order which Smith was attempting to appeal from was not an appealable order and dismissed the ap-

peal. *Smith* v. *The Fourth National Bank of Tulsa,* 73 P. (2d) 414. After this long delay by a worthless attempt at appealing a non-appealable order, the case came on for trial. Thereupon, Smith, the attorney from Sapulpa, Creek County, Oklahoma, petitioner herein, employed in addition to the lawyers connected with the case, one William Cheatham, an attorney of Bristow, Oklahoma, who was the former law partner of Honorable C. O. Beaver, the then presiding district judge in Creek County. The issues were made up, evidence submitted, and a judgment entered by the trial court, Honorable C. O. Beaver presiding, in favor of The Fourth National Bank of Tulsa and against Smith, for the relief prayed for, including adjudication of the lien and ordering foreclosure as against the real estate covered by the mortgage in Creek and other counties of the State of Oklahoma. The motion for new trial was overruled and an appeal taken to the Supreme Court of the State of Oklahoma for the second time. An opinion was written, affirming the judgment of the trial court. A petition for rehearing was filed and denied. An application for leave to file a second petition for rehearing was filed, and denied. And then the mandate issued to the trial court; whereupon an application was made by Smith to recall the mandate, and now he is attempting, after having his day in court, once in the Supreme Court of Kansas and twice in the Supreme Court of Oklahoma, in an ordinary mortgage foreclosure, to get into this court.

The petitioner herein has made one continuous effort for approximately nine year, eight of which have been spent in the courts of Kansas and Oklahoma, to evade an honest debt and defraud The Fourth National Bank out of its funds. He has used all the dilatory tactics known to the law, and has not once contended that he did not execute the note and mortgage, make payments thereon, or deny that the

amount of the judgment rendered is not due and owing. His only defenses have been technicalities, promptly overruled by the trial and appellate courts of Oklahoma and Kansas.

We submit the following:

Argument and Authorities.

PROPOSITION I.

This being an ordinary action for personal judgment on a promissory note and the foreclosure of a mortgage, there is no federal question involved and the application for the writ should be denied.

This court, in the case of *Erie Railroad Company* v. *Tompkins,* 82 L. ed. 1188, speaking through Mr. Justice BRANDEIS, said:

> "Excepting matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision, is not a matter of federal concern. There is no federal general common law."

The petitioner asserts that he has been deprived of the equal protection of the law, but when we examine the record we find no federal question involved, but we further find that he has had his day in court, both in the district and supreme courts of Kansas and in the District Court of Creek County, including two appeals from that court to the Supreme Court of the State of Oklahoma. Counsel for petitioner says that the Supreme Court of Oklahoma has failed to follow the settled law of the state. We say not. In any event, following the decision of this court in the *Erie Railroad* case, the Supreme Court of Oklahoma alone has the

right to pass upon and determine the laws of the State of Oklahoma so long as Acts of Congress and the Federal Constitution are not involved, and certainly where a court of justice enters a personal judgment against the defendant who has borrowed money from a bank and refuses to repay it, and for foreclosure of the mortgage, it is doing nothing but what justice and the law require. To hold otherwise would fly in the teeth of both law and justice.

After eight years of litigation, with no defense to an action on a promissory note and request for foreclosure of a mortgage, petitioner Smith clamors for more. If it were possible John T. Smith, petitioner herein, should be penalized for all these unreasonable delays and items of expense to which he has put the respondent herein in an effort to collect its debt against him.

Conclusion.

The only question here is—how long Smith can evade the payment of a debt created by direct borrowing from a bank, which fact he does not deny, and admits has not been paid. There is no other real issue. All questions have been passed upon by the appellate courts of Kansas and Oklahoma. There is no federal question involved.

It is respectfully submitted that the petition for writ of *certiorari* is without merit, is made for delay only, and should be denied.

CHAS. L. YANCEY,
G. C. SPILLERS,
KAVANAUGH BUSH,
Beacon Building,
Tulsa, Oklahoma,
Counsel for Respondent.

(32)

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No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

Reply to Brief of Respondent on Petition for Writ of Certiorari.

NEAL E. McNEILL,
Thompson Building,
Tulsa, Oklahoma,
Counsel for Petitioner.

W. VALJEAN BIDDISON,
Of Counsel.

INDEX.

	PAGE
Statement	1
Reply to argument and authorities	5
Conclusion	7

TABLE OF CASES.

Erie R. R. Co. v. Tompkins, 304 U. S. 64 to 92	6
Lane v. Choctaw O. & G. Co., 19 Okl. 324, 91 Pac. 933	4

STATUTES.

Oklahoma Statutes 1931, Sec. 101, subd. 101	4
Oklahoma Statutes 1931, Sec. 10957	4

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

REPLY TO BRIEF OF RESPONDENT ON PETITION FOR WRIT OF *CERTIORARI.*

Statement.

The response herein does not refer to the page or point in the record relied upon to support the statements therein contained, as required by Rule 27 (3) of this court. The petitioner does not feel justified in entirely ignoring the numerous unwarranted innuendoes and inaccurate statements contained in the response which are asserted as facts. The purpose of these, it is assumed, is to cloud the issues and create an unwarranted prejudice against petitioner to the extent that this court might, in the exercise of its discretionary power, overlook the real questions in issue, to-wit:

(a) The right of the petitioner to the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States; *(b)* the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others.

The assertion that petitioner is a Sapulpa attorney is unsupported by the record as the record is silent on this point. It is, however, a known fact that petitioner, prior to 1919, was in the active practice of law at Sapulpa but has been otherwise engaged since said date and, since 1925, resided in Tulsa until long after the trial herein.

Respondent by innuendo reflects upon the propriety of the petitioner employing one William Cheatham, a former partner of the trial judge. The record is silent on this point but, if permitted, we could show that such partnership had been terminated many years. Mr. Cheatham then represented the petitioner in other matters and, after judgment in the trial court, he was employed as a local attorney for the preparation of the record for appeal and paid a nominal fee of $50.00. The judgment prepared (C-m. 113-120) by attorneys for respondent discloses that Mr. Cheatham was not an attorney in the trial.

Respondent, without reference to the record, throughout its statement of the case, refers to dilatory tactics of the petitioner, apparently upon the theory that if it can convince this Honorable Court that the petitioner has been guilty of dilatory tactics, it avoids the question of lack of jurisdiction in the trial court and constitutes a justification for denying the petitioner the equal protection of the law.

Respondent, on page 2 of the response, asserts that the bank brought two suits on this particular note contempo-

raneously, one in Creek County, Oklahoma, and one in Chautauqua County, Kansas. The record, page 17, discloses that a suit on the promissory note was filed in Creek County on May 13, 1933, and the suit in Chautauqua County, Kansas, was not filed contemporaneously, but was filed November 9, 1933. (R. 52) Petitioner filed his answer in the District Court of Chautauqua County March 6, 1934. (R. 54-58) The case was set for trial (R. 61) by stipulation, April 12, 1934, and heard on said date, and taken under advisement by the court and judgment rendered on May 8, 1934. Motion for new trial was overruled June 4, 1934. (R. 65) This judgment was not superseded nor delayed by the petitioner, as asserted in the response, as execution was issued June 27, 1934 (R. 70), and sale had and confirmed August 7, 1934. (R. 74) The appeal in the Kansas court was not decided until May 4, 1935.

The record discloses with respect to petitioner's conduct in the Creek County action upon the motion for new trial being overruled (R. 65) in the Kansas case, June 4, 1934, and the note merged in said judgment, petitioner, two days thereafter or on June 6, 1934, filed his answer in the District Court of Creek County (R. 28) and, as a defense to the suit on the note (R. 30-31), pleaded the note had been merged in the judgment in the District Court of Chautauqua County, Kansas, on May 8, 1934, which constituted an abatement of and a bar to the suit on the note; that under the decisions of the Supreme Court of Oklahoma, upon judgment being rendered in the District Court of Kansas upon said note the cause of action upon the note was terminated and wholly extinguished.

The record refutes the assertion that the immediate delay thereafter was caused by petitioner, but on the contrary